

**FILED**  
NOV 23 2007  
HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY CLB

File No. 06-0577

## HEARING OFFICER'S REPORT

RESPONDENT.

1. Probable cause was found in this matter on March 20, 2007. A Complaint was thereafter filed on July 1, 2007. Respondent filed his answer on August 10, 2007. An initial case management conference was held on August 23, 2007, and a final hearing date was set on October 5, 2007. The parties subsequently advised that the matter had been resolved by a Joint Agreement. A hearing was held on the agreement on October 12, 2007.

2. The Complaint in this matter arose initially out of an overdraft in Respondent's trust account. A subsequent investigation revealed that Respondent was using his trust account for improper purposes. There was no loss to any client from Respondent's conduct, nor did Respondent realize any gain from either the overdraft or the improper use of the trust account

### **FINDINGS OF FACT**

3. At all times relevant hereto, Respondent was a lawyer licensed to practice law in the state of Arizona, having first been admitted to practice in Arizona on May 10, 1986

#### **Count One (File No. 06-0577)**

4. On or about April 3, 2006, a check in the amount of \$57,500 attempted to pay against Respondent's trust account at National Bank of Arizona when the balance in the account at the time was only \$53,125.22.
5. The bank paid the check and charged an overdraft fee, overdrawing the trust account to a total of \$4,430.78.
6. On April 12, 2006, the State Bar sent an initial screening letter to Respondent requesting a response within 20 days.
7. Respondent did not respond to the request
8. On May 9, 2006, the State Bar sent a non-response letter to Respondent reminding him of his obligation under Rule 53 and requesting a response within 10 days.
9. In his response dated May 23, 2006, and received May 24, 2006, Respondent explained that the overdraft was the result of a disbursement error
10. Respondent explained that a duplicate check had erroneously been sent to client BancPro that should have been voided by BancPro, but BancPro accidentally cashed the check instead
11. Respondent claimed that BancPro immediately issued a check back to the trust account, reimbursing it for the overdraft.

12. On June 7, 2006, the State Bar sent a letter to Respondent requesting additional information, including his March and April 2006 trust account statements with corresponding canceled checks, duplicate deposit slips, individual client ledgers, general ledger, and operating account. The letter requested this information be submitted within 20 days.
13. Respondent did not respond to the request.
14. On July 5, 2006, the State Bar sent a non-response letter to Respondent reminding him of his obligation under Rule 53 and requesting a response within 10 days.
15. On July 18, 2006, the State Bar received a fax from Respondent's legal assistant indicating that Respondent had been out of the state for the past month and would be returning on July 25, 2006.
16. By letter dated July 19, 2006, the State Bar granted Respondent an extension. Respondent was given until August 7, 2006, to submit his response.
17. Respondent did not timely respond to this request.
18. On August 10, 2006, the State Bar sent a non-response letter to Respondent informing him that, due to his failure to produce the documents, a subpoena duces tecum would be issued for them.
19. On August 15, 2006 a subpoena duces tecum was issued to Respondent for the requested documents.
20. On August 16, 2006, a subpoena duces tecum was issued to National Bank for the documents.
21. Respondent submitted all of the requested documents on August 25, 2006, and National Bank of Arizona submitted the requested information on August 30, 2006.

22. A review of the documents confirmed Respondent's explanation of the overdraft, but also revealed improper activities in Respondent's trust account
23. While the general ledger reflected the deposit, the individual client ledger for BancPro did not properly reflect the \$50,000 reimbursement deposit made to the trust account on August 5, 2006
24. On or about April 19, 2006, Respondent received a wire transfer into his IOLTA account in the amount of \$250. This transfer consisted of personal funds from Respondent's brother and was not related to any client representation.
25. While the general ledger reflected the deposit, there was no individual client ledger reflecting this transaction.
26. Throughout March and April of 2006, there were numerous deposits and withdrawals into and out of the trust account for client GigiBill.
27. GigiBill is a family limited partnership, in which respondent and his wife hold some of their personal assets
28. The GigiBill funds in Respondent's trust account were personal funds of Respondent and his wife and not being held in connection with specific legal representation of GigiBill
29. Throughout March and April of 2006, there were numerous deposits and withdrawals into and out of the trust account for clients BancPro and Intelexmedia
30. The BancPro and Intelexmedia funds held in Respondent's trust account were for the sale of stock
31. While BancPro and Intelexmedia were clients of Respondent, the funds in Respondent's trust account were general client business funds being temporarily held for the client, and not being held in connection with the specific legal representation of those clients.

## **CONCLUSIONS OF LAW**

32. The Hearing Officer finds by clear and convincing evidence that Respondent violated Rules 42, 43, 44 and 53 Ariz.R.Sup.Ct by
- Failing to hold property of his clients or third persons that was in his possession separate from his own property;
  - Depositing funds into his trust account not specifically held in connection with legal representation,
  - Failing to record all transactions of his trust account promptly and completely,
  - Failing to maintain, or cause to be maintained, an account ledger or the equivalent for each client, person or entity for whom monies had been received in trust showing the date and the amount of each receipt and disbursement and any unexpended balances;
  - Failing to respond promptly to the State Bar requests.
- 33 Respondent thus violated Rule 42, Ariz.R.Sup.Ct
- ER 1.15 - safekeeping property
- ER 8.1(b) - failure to respond.
- Rule 43 - trust account - duty to client
- Rule 44 - trust account requirements
- Rule 53 - grounds for discipline, specifically (F) prompt response

## **ABA STANDARDS**

- 34 ABA Standard 3 0 provides that four criteria should be considered: (1) the duty violated, (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

35. This hearing officer considered the following *Standards* in determining the appropriate sanction warranted by Respondent's conduct

*Standard 4.13*· Reprimand (censure) is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

- 36 The parties agreed, and the Hearing Officer could find no evidence to the contrary, that Respondent's conduct was negligent. There was also agreement that Respondent's clients suffered no actual injury, although there was the potential for injury because of the manner in which Respondent kept records, and funds were accounted for.

37. From the presumptive sanction of censure, the Hearing Officer must then consider the aggravating and mitigating factors

- 38 **Aggravating factors:**

The Hearing Officer finds the following aggravating factors.

*Standard 9.22(a)* - prior disciplinary offenses Respondent received an Informal Reprimand ("IR") on February 14, 2006, for violation of ER 1.8; Respondent received an IR on September 5, 2006, for violation of ER 1.15, and Respondent received an IR on December 12, 1995, for violation of ER's 1.1 and 1.4.

*Standard 9.22(i)* - substantial experience in the practice of law. Respondent was admitted to the practice of law on May 10, 1986, and has been an Arizona attorney for 21 years.

39. **Mitigating factors:**

The Hearing Officer finds the following mitigating factors

*Standard 9.32(b)* - absence of dishonest or selfish motive. Respondent's violation of the ethical rules are negligent, not intentional and provided him with no specific personal gain

*Standard 9 3(d)* - timely good-faith effort to make restitution or to rectify consequences of misconduct Respondent immediately deposited funds into the trust count to cover the overdraft.

*Standard 9 32(l)* - Respondent indicated he did not realize he could not keep certain funds in his trust account, and was freely accepting of Bar Counsel's determination that he could not. Respondent was willing to immediately change whatever was necessary to come into compliance with the rules

### **PROPORTIONALITY REVIEW**

40. The Supreme Court has held that in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline *In re Wines*, 135 Ariz 203, 660 P.2d 454 (1983), and *In re Wolfram*, 174, Ariz. 49, 847 P 2d 94 (1993)
41. In *In re Cawood*, SB-05-0147-D (2005), Cawood was censured with two years of probation and LOMAP for co-mingling client and firm funds, failing to maintain complete trust account records, failing to use pre-numbered checks, and failing to do a three-way reconciliation in violation of ER's 1 15 and 1 16 as well as Rules 43 and 44.
42. In *In re McKindles*, SB-05-0065-D (2005), McKindles was censured with one year of probation and LOMAP for keeping unearned fees in the trust account, co-mingling earned fees with client funds, failing to keep complete trust account records, and failing to exercise professional care in violation of ER 1.15 as well as Rules 43 and 44.

- 43 In *In re Miranda*, SB-05-0129-D (2005), Miranda was censured with one year of probation and LOMAP for co-mingling client and firm funds, failing to maintain complete trust account records, failing to do a three-way reconciliation, and failing to exercise professional care and internal controls in violation of ER 1.15 as well as Rules 43 and 44.

#### RECOMMENDATION

44. The parties recommend, and the Hearing Officer concurs, that the appropriate sanction in this matter is a censure with probation for one year and TAEPP, and Respondent to pay all costs and expenses occurred in this disciplinary proceeding.

DATED this 23rd day of November, 2007

H. Jeffrey Coker *pc*  
H Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk  
this 23rd day of November, 2007



Copy of the foregoing mailed  
this 26<sup>th</sup> day of November, 2007, to

Clarence W. Mulligan  
Respondent  
1745 South Alma School Road, Suite 205  
Mesa, AZ 85210-0001

Stephen P Little  
Bar Counsel  
State Bar of Arizona  
4201 North 24th Street, Suite 200  
Phoenix, AZ 85016-6288

by 